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IN THE SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1970

No. 253

JOHN WILL WINGO,
WARDEN OF KENTUCKY STATE PENITENTIARY
Petitioner,

VS.

KENNETH LEE BENOIT
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Opinions In the Courts Below

The Order of the United States District Court for the Western District of Kentucky was not officially reported. The Opinion reversing of the United States Court of Appeals for the Sixth Circuit is styled Kenneth Lee Benoit v. John Will Wingo, Warden Kentucky State Penitentiary and was reported in ___F.2d ___, (decided

April 3, 1970). Both the Order and the Opinion are attached in the Appendix.

Jurisdiction

The Judgment of the United States Court of Appeals for the Sixth Circuit was rendered on April 3, 1970. Petitioner's petition for rehearing was denied on April 28, 1970. On May 15, petitioner was granted a thirty-day extension of time in which to perfect a petition for writ of certiorari. Petitioner invokes the jurisdiction of the Court under 28 U.S.C. Sec. 1254 (1).

Question Presented

Whether the District Court was correct in ruling that respondent must exhaust his state remedies before he is entitled to federal habeas corpus relief.

Statutory Provision Involved

28 U.S.C. Sec. 2254 (b) (c) "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Statement of the Case

This is a petition for writ of certiorari filed by John Will Wingo, Warden of the Kentucky State Penitentiary at Eddyville, from an order of the United States Court of Appeals for the Sixth

Circuit requiring the Commonwealth to grant the respondent an appeal from his 1964 armed robbery conviction.

Respondent, Kenneth Lee Benoit, a state prisoner, is presently serving a life sentence, with the privilege of parole, for the June 8, 1964 armed robbery of the Ranch House Restaurant located at 2805 Dixie Highway in Louisville. Respondent was arrested after exchanging shots with police while attempting to escape from the scene of the robbery. The trial was held in the Jefferson Circuit Court on September 15, 1964.

On October 27, 1965, respondent filed a motion in the state courts to vacate his sentence of conviction. Respondent contended that he was denied a direct appeal from his conviction. The motion was denied by the trial court. The order of denial was affirmed upon appeal to the Kentucky

Court of Appeals. Benoit v. Commonwealth, Ky., 402 S.W.2d 706 (1966) cert. den. 385 U.S. 870.

The Kentucky Court of Appeals ruled that a hearing was not required on respondent's contention unless he alleged that he had asked his attorney to proceed with the appeal. If he did so he would be entitled to a hearing. Hammershoy v. Commonwealth, Ky., 398 S.W.2d 883 (1966). See Benoit v. Commonwealth, supra., at pp. 707, 708.

Instead of making his allegations in the state courts more specific, respondent proceeded on April 9, 1969 to the United States District Court for the Western District of Kentucky where he petitioned for a writ of habeas corpus. Respondent did allege there that he requested his attorney to proceed with the appeal. This was the allegation that would entitle him to a hearing in the state courts. As a consequence, the District

Court ruled that respondent had a remedy in the state courts within the meaning of 28 U.S.C. Sec. 2254.

Instead of then filing a motion in the state courts respondent appealed the District Court's ruling to the United States Court of Appeals for the Sixth Circuit. There the Court ruled that respondent was entitled to a state financed appeal from his 1964 conviction. For all practical purposes the Court skirted a ruling on the issue of exhaustion of state remedies: There was no evidentiary hearing ordered on the truth of petitioner's allegations or on whether the Commonwealth could rebut the allegations.

Since the Circuit Court has summarily ruled in this manner in the past, the petitioner is seeking a writ of certiorari. The basis for federal jurisdiction in the

District Court was 28 U.S.C. Sec. 2254 and Lane v. Brown, 372 U.S. 477 (1963).

ARGUMENT

THE RULING OF THE SIXTH CIRCUIT THAT RESPONDENT DOES NOT HAVE TO EXHAUST HIS STATE REMEDIES BEFORE OBTAINING FEDERAL HABEAS CORPUS RELIEF CONFLICTS WITH THE RULINGS OF OTHER CIRCUITS.

Although the Kentucky Court of Appeals stated that the respondent had a state remedy if the respondent made his allegation more specific, the Federal Circuit Court effectively ruled that respondent did not have to return to the state courts and exhaust this state remedy before he was entitled to a federal remedy.

The applicable statute which governs this issue is 28 U.S.C. Sec. 2254. That statute is quoted under Statutory Provision Involved.

The Circuit Court's ruling conflicts with rulings in United States Courts of Appeals for the First, Second, Fifth and Ninth Circuits.

See Needel v. Scafati, 1 Cir., 412 F.2d 761 (1969) where the petitioner contended in both the state and federal courts that he was denied a speedy trial. However, in the federal courts he amplified the allegations and evidence that he had presented to the state courts. The Circuit Court in finding that petitioner had not exhausted his state remedies stated:

> 'We are reluctant to prolong petitioner's pursuit and to nullify the careful efforts of the district court. But if the state and federal judicial systems are to work in complementary harmony, the state courts must be given a fair chance to assess constitutional issues. While federal courts should not abstain from decision simply because of the appearance of additional bits of evidence, inevitable in a new hearing, we find

here that the underlying thrust of the issues posed and the evidence adduced presented petitioner's case in a significantly different posture from that considered by the Massachusetts Supreme Judicial Court. Under these circumstances, we decide that the judgment below should be reversed and remanded with instructions to dismiss the petition.'

See also Frazier v. Langlois, 1 Cir., 412 F.2d 767 (1969).

In United States ex rel. Figueroa v. McMann, 2 Cir., 411 F.2d 915, 916 (1969) it was stated:

'When a state prisoner presents a materially different claim and stronger evidentiary case before the federal court in a habeas corpus petition, and a state forum is available to consider the additional factors and varied claim, the federal court should properly dismiss the petition before it. United States ex rel. Boodie v. Herold, 349 F.2d 372 (2 Cir. 1965); United States ex rel. Kessler v. Fay, 232 F.Supp. 139, 142 (S.D.N.Y. 1964); United States ex rel. Scarnato v. Fay, 347 F.2d 424 (2 Cir. 1965). Nothing in Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194,

19 L.Ed.2d 41, reversing United States ex rel. Roberts v. La Vallee, 373 F.2d 49 (2 Cir. 1967), requires a different result here.'

In Milton v. Wainwright, 5 Cir., 396 F.2d 214 (1968) the petitioner made different allegations in the federal courts than he had made in the state courts concerning the voluntariness of his confession. The Circuit Court ruled that the petitioner had not exhausted his state remedies.

The Court concluded its Opinion by stating:

'This raises questions for us as to the action now to be taken by us. Should we try to decide this on materials which have a remarkable, if not quite adequate, completeness? Should we send it back to the Federal District Court to evaluate and make the requisite findings? Or should we, in the interest of genuine working comity put the fact-finding responsibility as to this new factual thesis squarely on the Florida Courts where, initially at

> least, it belongs? On this we have no doubt. We are now committed to the fullest exploitation of the many new and urgently needed state post-conviction remedies. In the long run, time is saved and constitutional rights are better vindicated by assuring that state mechanisms to ascertain and find facts are fully used. We reject again, as we have so many times recently the beguiling appeal of remanding it for the Federal Judge to do what is initially the clear duty of the State Court. See State of Texas v. Payton, 5 Cir., 1968, 390 F.2d 261; accord, Beto v. Conley, 5 Cir., 1968, 393 F.2d 497; Mobley v. Dutton, 5 Cir., 1967, 380 F.2d 14. This is not abdiction. To the contrary it effectuates the Supremacy Clause in a vivid way to (a) place initial responsibility where it belongs and (b) hopefully by fact ascertainment and finding the constitutional claim will be recognized by the state court or, if not, (c) the Federal Court will have an adequate record on which to make the inescapably independent judgment on the facts. See 28 U.S.C.A. Sec 2254 as amended Nov. 2, 1966, Pub.L. 89-711, Sec. 2, 80 Stat. 1105.'

In Schiers v. People of the State of California, 9 Cir., 333 F.2d 173,

175, 176 (1964) the petitioner amplified in the federal courts the arguments that he had made in the state courts. The Circuit Court in finding that petitioner had not exhausted his state remedies stated, "In our judgment the state courts should first be given the opportunity to pass upon these issues in their present form."

As can be seen above, the Sixth Circuit Court's ruling, that respondent did not have to present his amplified allegations to the state courts in order to exhaust his state remedies, is in conflict with rulings in the other Circuit Courts which have rules upon the issue. The Circuit Court's ruling was made even though the state court pointed out that respondent only had to allege that he

requested his attorney to proceed with the appeal in order to be accorded relief under Hammershoy v. Commonwealth, supra.

Clearly, the District Court ruling was in accord with the decisions of the other Circuit Courts. For this reason petitioner seeks a writ of certiorari to resolve the conflict in the Circuit Courts on this issue.

CONCLUSION

For the reason that petitioner believes that the District Court was correct in requiring the respondent to exhaust his state remedies as required by 28 U.S.C. Sec. 2254 (b) (c) and for the reason the Circuit Courts are in conflict on this issue, petitioner respectfully requests that a writ of

certiorari be granted.

Respectfully submitted,

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DATED: June 11, 1970

APPENDIX

ORDER

OF THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

HONORABLE HENRY L. BROOKS, JUDGE

Petitioner, Kenneth Lee Benoit, a state prisoner, has tendered an application for a writ of habeas corpus. He contends that he told his court appointed counsel to perfect an appeal from his conviction for armed robbery and that he failed to do so.

Petitioner made the same allegation in the state court in his motion to vacate sentence except he failed to allege that he instructed his attorney to appeal. This failure required a dismissal of his motion by the Court of Appeals of Kentucky.

Benoit v. Commonwealth, Ky., 402 S.W.2d 706 (1966).

In its response the Commonwealth now states "Since petitioner has made his allegations more specific he is now entitled to relief under RCr 11.42." Therefore, since state remedies have not been exhausted as required by Title 28 United States Code Section 2254, this proceeding must be dismissed.

The motion of the petitioner to proceed in forma pauperis is sustained, the application for a writ of habeas corpus is dismissed.

September 2, 1969.

/s/ Henry L. Brooks
United States District Judge

1C

No. 19886

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Kenneth Lee Benoit, Petitioner-Appellant,	On Appeal from the United States District Court for the
v.	Western District of Kentucky, Louisville
John Will Wingo, Warden Kentucky State Penitentiary, Respondent-Appellee)	Division.

Decided April 3, 1970

Before: McCree and Combs, Circuit Judges, and Cecil, Senior Circuit Judge.

Cecil, Senior Circuit Judge. This is an appeal by Kenneth Lee Benoit, petitioner-appellant, from an order of the United States District Court for the Western District of Kentucky dismissing his petition for a writ of habeas corpus. Benoit was tried before a jury on a charge of armed

robbery in the Jefferson County, Kentucky, Circuit Court. The jury returned a verdict of guilty and fixed the punishment at life imprisonment. He was sentenced accordingly by the trial judge on October 23, 1964, which sentence he is now serving in a Kentucky state prison.

The substance of appellant's claim on this appeal is that he was denied effective assistance of counsel on an appeal from the trial court to the Court of Appeals of Kentucky. Following the conviction and sentence the appellant's court-appointed counsel filed a timely notice of appeal and secured an extension of time for the perfection of the appeal. Finally, he wrote the appellant a letter, as follows:

"Dear Mr. Benoit: March 2, 1965

After doing a great deal of research on your case I have come to the con-

clusion that on appeal we would be wasting our time.

So, therefore, I think it best that I do not proceed with appeal.

I have filed a notice of appeal with the court. Further I have gotten a extension for you. If you want to appeal your own case it will be best for you now to get a extension from the Court of Appeals.

Further you will have to draw up a record indicating your a pauper and ask for a transcript of the record. However, to keep your appeal going you will in the next week or so have to file a motion with the court of appeals asking for an extension.

If I were of the opinion we had any chance whatsoever on appeal I would continue, but it will be a waste of time. I would rather spend this time on something more meretorious.

I'm sorry I have to do this however, I believe I have no other choice.

Sincerely yours:
Stuart Lyon"

This letter reached the appellant while he was confined in the penitentiary

at a time when the time for perfecting the appeal had either expired or was so near to expiration that the appellant couldn't have been expected, on his own, to have processed the appeal. Counsel did not seek leave either of the trial judge or of his client to withdraw from the case. A notice of appeal had been filed in the trial court as a matter of record on October 30, 1964, and signed by the trial judge. An extension of time was granted by the trial judge on December 21, 1964.

Subsequently, the appellant filed pro se a petition in the Circuit Court under Kentucky Criminal Rule No. 11.42, to vacate the judgment and conviction. This was denied by the trial judge and the appellant appealed to the Kentucky Court of Appeals. The Court of Appeals affirmed

the judgment of the Circuit Court on the ground that the appellant's motion did not show that he had requested his court-appointed counsel to proceed with an appeal. Benoit v. Commonwealth, 402 S.W. 2d 706, cert. den. 385 U.S. 870.

In his petition to the District Court, the appellant alleged that he had requested his counsel to appeal his conviction. The district judge dismissed the petition for the reason that with an allegation that he had requested an appeal he would be entitled to relief under R.Cr. 11.42 and that he therefore had not exhausted his state remedies. (Sec. 2254, Title 28, U.S.C.) The Kentucky Court of Appeals had decided that an indigent defendant, upon request, was entitled to an appeal of his conviction with the aid of counsel and if it had been denied him such a

review must be provided or the conviction vacated. Hammershoy v. Commonwealth, 398 S.W. 2d 883.

It is no longer open to question that an indigent defendant has a constitutional right under the Fourteenth Amendment to a review of his case on appeal as a matter of right if the same right is extended to non indigents. Griffin v. Illinois, 351 U.S. 12; Lane v. Brown, 372 U.S. 477; Burns v. Ohio, 360 U.S. 252; Smith v. Bennett, 365 U.S. 708; Eskridge v. Washington Prison Board, 357 U.S. 214; United States ex rel., Diblin v. Follette, 418 F.2d 408, (C.A. 2). The indigent is entitled to have counsel to assist him in his appeal, Douglas v. California, 372 U.S. 353; Swenson v. Bosler, 386 U.S. 258; Schwander v. United States, 386 F.2d 20, 24-25, (C.A. 5); United State ex rel.Smith

v. McMann, 417 F.2d 648, (C.A. 2); Anders, v. California, 386 U.S. 738.

Whatever obligation there was on the appellant to request an appeal, the request would have been appropriately made after the conviction and within time to perfect an appeal. We think it is of no consequence under the facts of this case whether a request for an appeal was made. The process of an appeal was timely begun. If it was started as a result of the appellant's request he fulfilled his obligation to make a request. If it were started voluntarily by counsel there would have been no need to make a request. It was a matter of record that a notice of appeal had been filed and that an extension of time had been granted. The appellant had a right to rest with the assurance that his appeal was being processed.

The question here is, an appeal having been begun, whether the appellant had the effective assistance of counsel to prosecute it. We conclude that he did not.

Counsel in his letter to the appellant, abandoning the appeal, wrote with such finality that it gave the appellant no opportunity to request him to continue with the appeal. Further, counsel did not leave the appeal in such status that the appellant being confined in prison and being unlearned in law could be expected to pick it up pro se and prosecute it to the conclusion. Neither did he have an opportunity to have the trial judge appoint new counsel to assist him in the prosecution of his appeal. The appellant was entitled not only to an appeal as a matter of right but he was entitled to have the assistance of counsel in processing that appeal.

Court-appointed counsel should have sought leave of the trial judge to withdraw from the case and under such circumstances that there would be no prejudice to the appellant in continuing the appeal with newly appointed counsel. For the reasons herein expressed we conclude that the appellant did not have adequate and effective assistance of counsel in prosecuting his appeal. We do not question counsel's sincerity in informing his client that he concluded there was no merit to his appeal nor do we find that he intentionally and carelessly neglected his professional duty.

We conclude that on the record in the District Court the appellant was entitled to have a review of his trial and conviction as on original appeal or to be released. We remand the case to the

District Court with instructions to give the State an opportunity to provide the appellant with a review of his conviction with the aid of counsel on direct appeal as adequate as if counsel had pursued the appeal in the first instance. If the appellant has not been afforded an opportunity to appeal within ninety days after this opinion becomes final the appellant shall be released.

AFFIDAVIT OF SERVICE

I, James H. Barr, one of counsel for the Petitioner herein, certify that on the 11th day of June, 1970, service of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was served upon Kenneth Lee Benoit, Apartment 513, Box 128, Eddyville, Kentucky 42038, the Respondent, by depositing a copy of the same in the United States mail, first class, postage prepaid. I further certify that Respondent resides within 500 miles of the point at which such mailing was made.

James H. Barr
Assistant Attorney General
Commonwealth of Kentucky

Subscribed and sworn to before me this

11th day of June, 1970, by James H. Barr, personally known to me.

Mary L. Morris

Mary L. Morris
Notary Public
State of Kentucky at Large

My commission expires June 1, 1973.